Canada Legal Fight May 'Destroy the Faith' in First Nations Treaties

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Body

OVER THE HART RIVER, Yukon Territory -- The indigenous groups thought they had reached a deal: A vast landscape in the north of Yukon Territory would be mostly set aside for preservation, with only a small percentage allotted to industrial development.

But then the Yukon government decided to push aside this recommendation agreed to by a joint government-indigenous commission.

Instead, it favored far more development in the wilderness, which has huge deposits of coal, gas and minerals, including 18 billion tons of iron ore claimed by Chevron, the American petroleum giant.

Now the 26,000 square miles of the Peel Watershed -- an area larger than the state of West Virginia where mountain sheep graze on the sides of snow-capped peaks, and grizzlies and wolves hunt caribou and moose along the banks of six pristine rivers -- is at the heart of a legal battle before Canada's Supreme Court.

Its resolution could not only dictate the future of the watershed, but also redefine the legal relationship between indigenous people and the country's provincial and territorial governments under treaties they have signed in recent decades.

"Once governments get a treaty, they tend to tinker with it and ignore promises they made," said Gordon Christie, a professor of aboriginal law at the University of British Columbia. "What is the remedy if a government doesn't live up to terms of a treaty? That's the big question."

The original agreement to protect 80 percent of the watershed from industrial development resulted from seven years of study by the joint indigenous-government commission, formed as part of a land-use planning process laid out in 30-year-old treaties between indigenous groups and the Yukon government.

The modern treaties, known officially as final agreements, were supposed to give three indigenous groups, known as First Nations, in the Yukon a voice in deciding the fate of the watershed, one of the largest stretches of wilderness left in North America.

The government says the recommendation from the commission is simply that -- a recommendation and not binding.

But the First Nations say the treaties are meaningless unless the recommendation is upheld. At stake, they say, is how much influence Canada's original inhabitants will have over land and natural resources in their traditional territories.

They also say that to allow the Yukon government to renegotiate the plan would undermine the spirit of reconciliation, one of Prime Minister Justin Trudeau's goals in building a new relationship with Canada's 1.4 million aboriginal people, who face disproportionately high levels of poverty, incarceration and violence.

"It would destroy the faith of First Nations in these modern treaties if the government can just go back and start over and even then can reject the whole thing," said Thomas Berger, a lawyer who represents the First Nations and environmental groups.

The Yukon government argues that the territory's elected officials should have the final say over the region's future.

The case has drawn widespread attention from industry groups and environmentalists.

"Mother Nature has given us many gifts, beautiful rivers, the land they flow through, the mountains and the trees that we can see, but we should not forget that she also gave us minerals that allow us to live in a modern society," Mike Burke, the president of the Yukon Chamber of Mines, said in a statement.

"Removal of large areas of land to mineral exploration will never allow us to make proper land use decisions."

Environmentalists say that Canada's legal system is flawed, because it ends up favoring resource extraction. A decision against the indigenous groups would reinforce this argument.

"Canada's laws are gold rush laws," said Devon Page, the executive director of Ecojustice, a nonprofit organization based in Vancouver. "There's a public perception, because we have a lot of green spaces and mountains, that Canada is a steward of the environment, but in fact the opposite is true."

Nobody has lived in the watershed for generations. But Jimmy Johnny, 72, a member of the Na-Cho Nyak Dun First Nation, and many other indigenous people have long traveled there to hunt.

"The Peel is our heritage, and we want it to be protected for the generations that come after us," said Mr. Johnny, whose First Nation is one of the plaintiffs in the lawsuit.

Sitting in his kitchen in the town of Mayo, he pulled out a large map of the wilderness and pointed to the dozens of traditional indigenous campsites, trails, hunting grounds and burial sites that he knew intimately during his 52-year-career as a hunting guide in the watershed.

Then he brought out a large bag of dried caribou horn lichen he had collected in the watershed, along with a container of golden medicinal tea made from the vegetation.

"I'm tired of the government destroying our history and culture, but they don't listen to us," he said, after taking a long drink of the tea. "That's why we went to court."

The land-use planning process laid out in the treaties was supposed to prevent exactly this sort of dispute from arising. The commission that developed the original plan based its recommendation on input from indigenous groups and the government, as well as on consultations with other Yukon residents, industry groups and environmental organizations.

The First Nations initially wanted the entire watershed preserved, but in 2011 the commission came up with the plan to preserve 80 percent of the land and allow industrial development on the other 20 percent.

Then in 2014, the Yukon government rejected the commission's plan and adopted its own version that opened more than two-thirds of the watershed for road construction and resource extraction.

David Loeks, the chairman of the commission who was appointed by the Yukon government, accused the government of not participating honestly in the $1.2 million planning process. "At every juncture there were many

major points where the Yukon government could have weighed in and said, 'Hold up,' he said. "But they never did that."

Joined by the Yukon Conservation Society and the Yukon chapter of the Canadian Parks and Wilderness Society, the First Nations filed their lawsuit.

Two lower courts ruled that by ignoring the commission's recommendation the government had violated rights guaranteed under the treaties. They disagreed, though, over whether the government could renegotiate for a different deal.

By the time the case reached Canada's Supreme Court in the spring, the territory had elected a new government. In its court filings, the new administration asked to renegotiate the original plan.

And with an eye on other parts of Yukon that have yet to go through the planning process, the government also argued that it should retain the right to reject the final outcome.

"The Supreme Court could decide that not only are governments legally bound by the terms of modern treaties but also that they can't count on getting a second chance if they breach those obligations," said Martin Olszynski, an environmental law professor at the University of Calgary.

The Supreme Court's decision, expected soon, will have an impact far beyond Yukon.

"If we win, it will be a huge victory for First Nations across Canada," said Simon Mervyn, chief of the Na-Cho Nyak Dun. "The ruling will set a national precedent for how our final agreements are interpreted."

https://www.nytimes.com/2017/11/05/world/canada/yukon-indigenous-treaties.html

Graphic

PHOTO: The Hart River, running through the Peel Watershed in Yukon. The vast wilderness has huge deposits of coal, gas and minerals. (PHOTOGRAPH BY AARON VINCENT ELKAIM FOR THE NEW YORK TIMES)

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